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SKY v Peguam Negara

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-34–4–05 OF 2022
EVROL MARIETTE PETERS J
13 FEBRUARY 2023

C *Civil Procedure — Appeal — Appeal against the decision by deputy registrar for production of a DNA report — Whether the production of a birth certificate of the petitioner was conclusive proof of the identity of the biological parents — Legitimacy Act 1961 ss 3, 4 & 5 — Births and Deaths Registration Act 1957 s 13*

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This was an appeal by the petitioner ('SKY') against the decision of the deputy registrar for instructing the petitioner to adduce a deoxyribonucleic acid ('DNA') report, pursuant to the request by the respondent. The petitioner was born on 27 March 2015 and on her birth certificate, her parents were listed as E ICU, a foreign woman, and SIN, a Malaysian man. ICU and SIN registered their marriage on 16 April 2015. Since the petitioner was born out of wedlock, SIN filed an application pursuant to s 3 and 4 of the Legitimacy Act 1961 ('the Legitimacy Act') for a declaration that she was the legitimate child of ICU and F SIN. At the case management on 28 June 2022, the deputy registrar agreed with the request by the respondent to require a DNA report to be adduced to prove that ICU and SIN were in fact the biological parents of SKY. Dissatisfied with the decision, the petitioner filed an appeal. The issue for consideration was: (a) whether the production of the birth certificate was conclusive proof of G the identity of the petitioner's biological parents, and (b) whether the respondent was empowered to request the production of a DNA report.

Held, dismissing the appeal by the petitioner:

(1) The court was of the view that the case of *Karpaya a/l Maliandy (acting through Genesan a/l Karuppiah, holder of valid power of attorney) v Kerisnan @ Krishnan a/l Malayaandy* [2022] 2 MLJ 931, was untenable as the Court of Appeal in the said case had addressed an entirely different issue of whether the learned trial judge had fallen into error in refusing to admit the birth certificate, despite having received certified copies of the same. That case had nothing to do with the procedure and evidence required in an application to legitimise a person out of wedlock. In the present case, it was undisputed that the petitioner was born out of wedlock which resulted in the application of s 13 of the Births and Deaths Registration Act 1957 ('the Births and Deaths Registration'). The

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court was of the view that based on the s 13 of the Births and Deaths Registration, the acknowledgment was not conclusive proof of its contents, and as such, the birth certificate was not conclusive proof that SIN was, in fact, the petitioner's biological father (see paras 8–10).

(2) Section 5 of the Legitimacy Act allows the respondent to request for the production of a DNA report. The court was of the view that the phrase 'verifying the facts alleged in the same' of the said Act allows the respondent to request proof to verify the claim that the alleged persons named in the petitioner's birth certificate were in fact her biological parents. Since it was the petitioner who filed the application, she should comply with the necessary requirements and the request for a DNA report to establish her own claim was within reason (see paras 12–13).

(3) Reliance by the petitioner on the case of *CAS v MPPL & Anor* [2019] 4 MLJ 243 , was misconceived as the Court of Appeal, in that case, dealt with the issue of a child who was in fact born within a valid marriage which had no bearing on the present case as the petitioner was born out of wedlock. The court was also unable to accept the public policy argument by the petitioner that insisting on a DNA report will further prejudice her as she is currently cloaked by the social stigma of being an illegitimate child. There was nothing sinister or perverse on the part of the respondent in requesting for production of a DNA report, as it was a common practice for the respondent to do so in cases dealing with an application to legitimise, pursuant to ss 3 and 4 of the Legitimacy Act (see paras 14–16 & 18).

[Bahasa Malaysia summary

Ini merupakan rayuan oleh pempetisyen ('SKY') terhadap keputusan timbalan pendaftar kerana mengarahkan pempetisyen untuk memberikan laporan asid deoksiribonukleik ('DNA'), menurut permohonan responden. Pempetisyen dilahirkan pada 27 Mac 2015 dan di dalam sijil kelahirannya, ibu bapanya disenaraikan sebagai ICU, seorang wanita asing, dan SIN, seorang warganegara lelaki Malaysia. ICU dan SIN mendaftarkan perkahwinan mereka pada 16 April 2015. Oleh kerana pempetisyen dilahirkan di luar perkahwinan, SIN memfailkan permohonan menurut ss 3 dan 4 Akta Kesahtarafan 1961 ('Akta Kesahtarafan') untuk perisytiharan bahawa dia adalah anak sah ICU dan SIN. Ketika pengurusan kes pada 28 Jun 2022, timbalan pendaftar bersetuju dengan permohonan responden supaya laporan DNA dibuat untuk membuktikan bahawa ICU dan SIN sebenarnya adalah ibu bapa kandung SKY. Tidak berpuas hati dengan keputusan itu, pempetisyen memfailkan rayuan ini. Isu untuk dipertimbangkan adalah: (a) sama ada pengeluaran sijil kelahiran adalah bukti konklusif identiti ibu bapa kandung pempetisyen; dan (b) sama ada responden diberi kuasa untuk meminta pengeluaran laporan DNA.

Diputuskan, menolak rayuan pempetisyen:

(1) Mahkamah berpendapat bahawa kes *Karpaya a/l Maliandy (acting through Genesan a/l Karuppiah, holder of valid power of attorney) v Kerisnan @ Krishnan a/l Malayaandy* [2022] 2 MLJ 931, tidak dapat dipertahankan kerana Mahkamah Rayuan dalam kes tersebut telah memutuskan isu yang berbeza iaitu, sama ada hakim bicara yang bijaksana telah terkhilaf kerana tidak menerima sijil kelahiran, walaupun salinan yang disahkan telah diterima. Kes itu tidak ada kaitan dengan prosedur dan keterangan yang diperlukan dalam permohonan untuk mensahtarafkan anak yang lahir di luar perkahwinan. Dalam kes ini, tidak dapat dipertikaikan bahawa pempetisyen lahir di luar perkahwinan yang menjurus kepada permohonan s 13 Akta Pendaftaran Kelahiran dan Kematian 1957 ('Pendaftaran Kelahiran dan Kematian') ini. Mahkamah berpendapat bahawa menurut s 13 Pendaftaran Kelahiran dan Kematian, pengakuan itu bukanlah satu keterangan konklusif mengenai kandungannya, dan oleh itu, sijil kelahiran bukanlah keterangan konklusif bahawa SIN sebenarnya bapa kandung pempetisyen (lihat perenggan 8–10).

(2) Seksyen 5 Akta Kesahtarafan membolehkan responden memohon penghasilan laporan DNA. Mahkamah berpandangan frasa 'menentusahkan fakta yang dikatakan didalamnya' di dalam akta berkenaan membolehkan responden memohon bukti bagi mengesahkan dakwaan bahawa orang yang didakwa dinamakan dalam sijil kelahiran pempetisyen itu sebenarnya adalah ibu bapa kandungnya. Oleh kerana pempetisyen yang memfailkan permohonan itu, dia harus mematuhi syarat-syarat yang diperlukan dan penghasilan laporan DNA adalah penting untuk membuktikan tuntutannya sendiri (lihat perenggan 12–13).

(3) Kebergantungan kepada kes *CAS v MPPL & Anor* [2019] 4 MLJ 243 oleh pempetisyen telah difahami secara salah kerana Mahkamah Rayuan dalam kes itu memutuskan mengenai isu seorang kanak-kanak yang sebenarnya dilahirkan dalam perkahwinan yang sah yang mana ianya tidak mempunyai kesan ke atas kes ini kerana pempetisyen dilahirkan di luar nikah. Mahkamah juga tidak dapat menerima hujah dasar awam oleh pempetisyen yang menyatakan laporan DNA akan menjejaskannya sebagai anak tidak sah taraf kerana stigma sosial. Tiada sebarang perkara yang jahat atau tidak betul di pihak responden dalam memohon penghasilan laporan DNA, kerana ianya adalah amalan biasa bagi responden untuk berbuat demikian dalam kes-kes permohonan pengsahtarafan, menurut ss 3 dan 4 Akta Kesahtarafan (lihat perenggan 14–16 & 18).]

Cases referred to

CAS v MPPL & Anor [2019] 4 MLJ 243 ; [2022] 6 CLJ 713, CA (distd)
Karpaya a/l Maliandy (acting through Genesan a/l Karuppiah, holder of valid power of attorney) v Kerisnan @ Krishnan a/l Malayaandy [2022] 2 MLJ 931, CA (distd)

Legislation referred to

Births and Deaths Registration Act 1957 ss 13, 32, 33
Evidence Act 1950 ss 35, 112
Legitimacy Act 1961 ss 3, 4, 5

Ngeow Chow Ying (Ngeow & Tan) for the applicant.
Rohaiza bt Hamzah (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Evrol Mariette Peters J:

INTRODUCTION

[1] This was an appeal by the petitioner against the decision of the Deputy Registrar in instructing the petitioner to adduce a deoxyribonucleic acid ('DNA') report, pursuant to the request of the respondent.

[2] In the interest of privacy and considering the sensitivity of the issues in these proceedings, the petitioner has been anonymised in this judgment as SKY, and the persons claiming to be her mother and father, as ICU and SIN respectively.

THE FACTUAL BACKGROUND

[3] The petitioner was born on 27 March 2015, and in her birth certificate, her parents were listed as ICU, a foreign woman, and SIN, a Malaysian man. ICU and SIN subsequently registered their marriage on 16 April 2015.

[4] Since the petitioner was born out of wedlock, she, through her litigation representative, SIN, filed an application ('the application') pursuant to ss 3 and 4 of the Legitimacy Act 1961 ('the Legitimacy Act'), for a declaration that she is the legitimate child of ICU and SIN. The provisions read:

> Section 3 — Conditions of applications of this Act
>
> (1) Nothing in this Act shall operate to legitimate a person *unless the marriage leading to the legitimation was solemnised and registered in accordance with* —
>
> (a) the Civil Marriage Ordinance 1952* [*Ord. No. 44 of 1952*], or the

A Christian Marriage Ordinance 1956* [*Ord. No. 33 of 1956*];

(b) the Christian Marriage Ordinance* [*Cap. 24*] or the Marriage Ordinance 1959* [*Ord. No. 14 of 1959*], of Sabah; or

(c) the Church and Civil Marriage Ordinance of Sarawak* [*Cap. 92*], or any Enactment or Ordinance repealed by any of the said Ordinances.

(2) (Deleted by Act 164)

(3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in property save as hereinafter in this Act expressly provided.

Section 4 — *Legitimation by subsequent marriage of parents*

Subject to section 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, *legitimate from the prescribed date or from the date of the marriage, whichever is the later.* (Emphasis added.)

[5] At the case management on 28 June 2022, the respondent had informed the court that it would require a DNA report to be adduced to prove that both ICU and SIN are in fact her biological parents. The petitioner objected to such request but the Deputy Registrar agreed with the respondent and instructed the petitioner to produce such report.

[6] Dissatisfied with the decision of the Deputy Registrar, the petitioner filed an appeal ('the appeal'), which was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

[7] The petitioner contended, on the authority of the Court of Appeal case of *Karpaya a/l Maliandy (acting through Genesan a/l Karuppiah, holder of valid power of attorney) v Kerisnan @ Krishnan a/l Malayaandy* [2022] 2 MLJ 931 that, based on ss 32 and 33 of the Births and Deaths Registration Act 1957 ('Births and Deaths Registration Act'), as well as s 35 of the Evidence Act 1950 ('the Evidence Act'), her birth certificate is conclusive proof of the identity of her biological parents and hence, the respondent's insistence on a DNA report to prove the same was not necessary. The provisions read:

Births and Deaths Registration Act 1957

Section 32 — Issue of Certificates of Birth, Certificates of Death and Certificates of Presumed Death

...

(2) Every Certificate of Birth, Certificate of Death or Certificate of Presumed Death

shall be certified under the hand of the Registrar or the Registrar-General or the Superintendent Registrar having the custody of the register.

Section 33 — Entry in register as evidence of birth, death or presumed death

...

(2) An entry in a register or a Certificate of Birth, Certificate of Death or Certificate of Presumed Death relating thereto, shall not be received as evidence under this section unless —

...

(b) the entry is an entry of a birth which is signed by a person professing to be a Superintendent Registrar, or which purports to have been made with the authority of the Registrar General; or

...

(3) For the purposes of this section a Certificate of Birth, Certificate of Death or Certificate of Presumed Death shall be deemed to be a certified copy if it purports to have been certified in accordance with subsection 32(2) notwithstanding that it may be —

(a) photographically reproduced; or

(b) an extract of the information contained in the register in a form prescribed which form may be different from that in which the original entry was made.

Evidence Act 1950

Section 35 — *Relevancy of entry in public record made in performance of duty*

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[8] In my view, the petition's contention was untenable as the Court of Appeal in the case of *Karpaya a/l Maliandy (acting through Genesan a/l Karuppiah, holder of valid power of attorney) v Kerisnan @ Krishnan a/l Malayaandy*, had addressed an entirely different issue, that is, whether the learned trial judge in that case had fallen into error in refusing to admit the birth certificate, despite having received certified copies of the same. That case had nothing to do with the procedure and evidence required in an application to legitimise a person born out of wedlock.

[9] In the present case, it was undisputed that the petitioner was born out of wedlock, which resulted in a 'PERMOHONAN SEKSYEN 13' endorsement on her birth certificate. Section 13 of the Births and Deaths Registration Act reads:

Section 13 — *Provisions as to father of illegitimate child*

A Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and *the person acknowledging himself to be the father of the child*, and
B that person shall in that case sign the register together with the mother. (Emphasis added.)

[10] Section 13 of the Births and Deaths Registration Act which deals with illegitimate children, refers to the 'person acknowledging himself to be the
C father of the child' which is SIN. That acknowledgement is not conclusive proof of its contents, and as such, the birth certificate of the petitioner was not conclusive proof that SIN is in fact her biological father.

[11] The petitioner proceeded to argue on the basis of *CAS v MPPL*
D *& Anor* [2019] 4 MLJ 243 ; [2022] 6 CLJ 713, that there was no provision in law that empowered the respondent to insist on production of a DNA report.

[12] I was unable to accept this line of argument, in view of a perusal of s 5
E of the Legitimacy Act which allows the respondent to request for the production of a DNA report. The provision reads:

Section 5 — Declarations of legitimacy of legitimated persons.

(1) A person claiming that he or his parent or any remoter ancestor became or
F has become a legitimated person may, whether domiciled in Malaysia or elsewhere, apply by petition to the High Court praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, or that his parent or remoter ancestor was legitimate; and the High Court shall have jurisdiction to hear and determine the application and to make
G a decree declaratory of the legitimacy or illegitimacy of that person as to the Court may seem just; and that decree shall be binding to all intents and purposes on all persons whomsoever.

(2) *Every petition under this section shall be accompanied by such affidavit verifying the facts alleged in the same, and by such proof of the absence of fraud*
H *or collusion, as the Court may by any general rule direct*.

(3) In all proceedings under this section the Court shall have full power to award and enforce payment of costs to any person cited, whether that person shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that the costs should be paid.

I (4) A copy of every petition under this section, and of the affidavit accompanying the same, shall, not less than one month before the filing thereof, be delivered to the Attorney General, who shall be a respondent upon the hearing of the petition and upon every subsequent proceeding relating thereto.

(5) Where any application is made under this section to the Court, such person (if any) besides the *Attorney General* as the Court shall think fit shall, subject to the rules made under this section, be cited to see proceedings, or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and *oppose the application.*

(6) The decree of the Court shall not in any case prejudice any person —

(a) if it is subsequently proved to have been obtained by fraud or collusion; or

(b) unless that person has been cited or made a party to the proceedings or is the heir-at-law, next-of-kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party. (Emphasis added.)

[13] Since the respondent is given the right to oppose this application, in my view, the phrase 'verifying the facts alleged in the same' allows the respondent to request for proof to verify the claim that the alleged persons named in the petitioner's birth certificate are in fact her biological parents. Since it was the petitioner who filed this application, she should comply with the necessary requirements, and the request for a DNA report to establish her own claim is within reason.

[14] I also took the view that the petitioner's reliance on the case of *CAS v MPPL & Anor* is misconceived. This is because in that case, the Court of Appeal dealt with the issue of a child who was in fact born within a valid marriage, but whose legitimacy was disputed on the premise that the mother of that child was not married to his biological father. This attracted the provision in s 112 of the Evidence Act which reads:

Section 112 — *Birth during marriage conclusive proof of legitimacy*

The fact that any *person was born during the continuance of a valid marriage* between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, *shall be conclusive proof that he is the legitimate son of that man*, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. (Emphasis added.)

[15] In the present case, the issue concerned the petitioner who was born out of wedlock, and who now prayed for a declaration that she is the biological child of SIN and ICU. As such, *CAS v MPPL & Anor* had no bearing on the present case.

[16] The petitioner had finally relied on the public policy argument to urge the court to allow this appeal, in view of the claim that the petitioner is

currently cloaked by the 'social stigma' of being an illegitimate child, and to insist on a DNA report will further prejudice her.

[17] I was unable to accept such argument, since the law is crystal clear on the procedural requirement for the process of legitimising a person and as such, it was untenable to now claim that the request by the respondent for a DNA report is contrary to public policy.

[18] There was nothing sinister or perverse on the part of the respondent in requesting for production of a DNA report, as it is a common practice for the respondent to do so in cases dealing with an application to legitimise, pursuant to ss 3 and 4 of the Legitimacy Act.

[19] Hence, in the interest of determining the truth of the biological parentage of the petitioner, the balance of justice tips in favour of the production of a DNA report.

CONCLUSION

[20] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, and submissions of both parties, this appeal was dismissed with costs.

Appeal dismissed.

Reported by Rafinie Ramli